(1) 95-419

Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

EDDIE L. TAYLOR, Petitioner,

v.

THE GOODYEAR TIRE & RUBBER COMPANY,
Respondent

On Petition for a Writ of Certiorari to
the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an action brought pursuant to Section 510 of the Employee's Retirement Income Security Act Hereinafter ERISA), 29 U.S.C. Section 1140, has a statute of limitations for breach of a written agreement, or the statute of limitation based on employment discrimination and/or wrongful termination law.

2. Can the statute of limitation run against an individual who is mentally ill?

3. Does the doctrine of collateral estoppel and res judicata preclude litigating a claim based on ERISA even after arbitration of termination of benefits has occurred resulting in an adverse decision to claimant?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

EDDIE L. TAYLOR, Petitioner,

v.

THE GOODYEAR TIRE & RUBBER COMPANY,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Plaintiff respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix 1-3) and the district court are unreported.

JURISDICTION

The court of appeals entered its judgment in this matter on October 17, 1994, and after timely filing for a Petition for Rehearing, The Court of Appeals for the Sixth Circuit denied the Petition on May 5, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Section 510 of the Employee's Retirement Income Security Act (ERISA), 29 U.S.C. Section 1140, (Appendix 6) provides, in pertinent part, that it shall be unlawful for any person to discharge, ... a participant or beneficiary for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan ....

The question of what statute of limitation applies to an ERISA claim, or stemming from state law which varies from state to state, and the question of the statute of limitation for an appeal from an arbitration award when the grievant is mentally ill should be clarified by this court.

STATEMENT

Petitioner worked for The Goodyear Tire & Rubber Company and was laid off until January of 1980. While on lay off status, he was incarcerated in the Ohio penal system where he developed and thus began to suffer from a mental illness. While incarcerated and suffering from the mental illness, Respondent The Goodyear Tire & Rubber Company sent Petitioner a recall letter on September 30, 1983 requesting that he return to work.

Petitioner could not respond to the recall letter due to his incarceration, mental illness, and inability to report for work, and hence, his employment status was terminated. When Petitioner was released from prison in 1985, he sought Goodyear to retroactively classify him as on a sick leave of absence due to his mental illness. This endeavor was through grievance and arbitration proceedings.

Acting primarily in a pro se capacity, Petitioner challenged the arbitrators' decision but this was dismissed by the district court on the grounds that Petitioner's complaint was not filed within the three month filing deadline required in the United States Code. This dismissal occurred despite Petitioner's disability of mental illness.

Petitioner further alleged that Goodyear maintained a health insurance and hospitalization plan that would have paid medical expenses arising out of his mental illness, and that Goodyear also maintained a retirement and pension plan in which Petitioner was entitled to participate. Petitioner alleged that when Goodyear discharged him and refused to recall him, Goodyear acted with the intent to interfere with Petitioner's "attainment of benefits under an employee benefit plan and in discrimination of Plaintiff's future participation in the plan because of his mental illness." This was alleged to be a violation of Section 510 under the Employee Retirement Income Security Act, 29 U.S.C. Section 1140. Petitioner also alleged that the actions were in violation and a breach of a collective bargaining

agreement which Goodyear was a party to. Petitioner sought reinstatement and back earnings, as well as compensatory damages.

Respondent The Goodyear Tire & Rubber Company denied that it breached any obligations to Petitioner under ERISA or under any alleged contract. Goodyear also raised the defenses that Petitioner's claims were barred by "the applicable statute of limitations" and that his claims were barred based on "res judicata and collateral estoppel" because Goodyear was previously granted judgment in its favor in a prior Federal lawsuit between the parties arising out of an arbitration between the parties involving the same facts.

Respondent The Goodyear Tire & Rubber Company claims that res judicata must apply because after the recall occurred, and after the time passed, and thereafter

in April of 1985, Petitioner was released from prison, he filed a grievance relating to his termination by the Respondent. Plaintiff pursued his grievance through arbitration and was unsuccessful in being reinstated to his former employment. Plaintiff, however, challenged the arbitration award proceeding in a pro se capacity. This arbitration decision therefore was never reviewed on its merits because the Court found and decided that his challenge was past the limitations period. Subsequently, Plaintiff retained counsel and pursued a motion for relief from judgment pursuant to Federal Rule of Procedure 60(B). This United States District Court for the Northern District of Ohio, Eastern Division, denied this motion and on appeal the Sixth Circuit Court of Appeals affirmed the lower court.

Hence, due to the limited nature of a review of an arbitration decision, Petitioner never asserted any claims under the ERISA act. Therefore, the issue as to whether Petitioner was ever denied benefits, or whether he was inappropriately recalled was never litigated in any proceedings. This is of critical importance because in affirming the lower court's dismissal of Petitioner's ERISA claim, the Court of Appeals reasoned that any ERISA claim is prohibited through the doctrines of res judicata and collateral estoppel as well as finding that the ERISA claim was not filed within the court determined four year statute of limitations.

Petitioner is seeking to have this court once and for all define what statute of limitations applies to an ERISA claim

and to declare that collateral estoppel and res judicata does not apply to a ERISA claim not yet litigated.

A. Employment Retirement Income Security Act

This case involves the construction of how a statute of limitation should be applied and the length of time in regard to a very important statutory provision affecting the lives of workers across America.

Petitioner's claim was originally brought pursuant to 29 U.S.C. Section 1140, which statute does not provide an express statute of limitation. In this instance, Petitioner alleges Respondent The Goodyear Tire & Rubber Company breached various duties to him under a written employee benefit plan and collective bargaining contract. He claims

that they breached the contract by attempting to recall him while he was in a mental illness, that is, disability status, and therefore violated the ERISA statute by discharging him such that he could not participate under the plan.

Contracts in writing typically have a long statute of limitations such as 15 years in the State of Ohio. The employee benefit plan and collective bargaining agreement is a contract and the statute of limitations should be 15 years for breach of such contract and not four years for a wrongful discharge of employment.

This proposition was supported in the Sixth Circuit case of Cowden v. Montgomery County Society for Cancer Control, 591 F. Supp. 740 (S.D. Ohio 1984), where certain claims based on an alleged breach of its pension plan were presented to the Court. The Court commented:

> With respect to those claims ... which appeared to allege that either one or both defendants did not comply with the terms of the pension plan, whose claims sound in contract ... the applicable statute of limitations, then, for such claims is O.R.C. Section 2305.06 which provides that "an action upon ... a contract ... shall be brought within 15 years after the cause thereof accrued. Cowden 591 F. Supp. at 754-755.

The Court in the Southern District of Ohio later held in Dennis v. Sawbrook Steel Castings Co., 792 F. Supp. 552 (S.D. Ohio, 1991) that an action based on a claim alleging violation of a pension plan and collective bargaining agreement has a 15 year statute of limitations. Likewise, in the case at bar, the allegations are of violations of an employee benefit plan and a collective bargaining agreement which are writings, that is "a contract." It is therefore especially appropriate to apply a contract period of limitations to a

breach of a collective bargaining agreement. This Court has spoken to this effect in International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) where the Court held that a union's action for a breach of a collective bargaining agreement is appropriately governed by a state's contract statute of limitations.

Indeed, the neighboring district court in the western district of Pennsylvania has spoken on the subject of statute of limitation period in regard to an ERISA claim. In the case of Delisi v. United Parcel Service, Inc., 580 F. Supp. 1572 (1984), the court followed the proposition that one must look to the most closely analogous state limitations period. The court stated:

> Faced with this question in the past, we have concluded that Pennsylvania's limitations period for contract actions is applicable to ERISA claims.

It is of further public concern that the Federal Circuit Courts that have addressed this issue are in great conflict as to what particular statute of limitations should apply. Some of the Courts have analyzed claims brought under 29 U.S.C. Section 1140 to employment discrimination or wrongful discharge causes of action, such as the lower court in this particular action.

It is thus an important question that this Court should decide as to what number of years the statute of limitations should be on the very important ERISA claims, whether a short term statute of limitations of four years, or a more lengthy statute of limitations such as 15

years. It would seem more appropriate to have a longer statute of limitations so that the integrity of contract can be more likely to be preserved.

It is especially appropriate to apply a state contract period of limitations to a breach of a collective bargaining agreement. In International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) the United States Supreme Court held that a union's action for a breach of a collective bargaining agreement is appropriately governed by a state's contract statute of limitations.

The federal Circuit Courts that have addressed this issue are in conflict. Some courts have analyzed claims brought under 29 U.S.C. Section 1140 to employment discrimination or wrongful discharge causes of action. Felton v. Unisource Corp., 940 F. 2d 503 (9th Cir. 1991);

Gavalik v. Continental Can Co., 812 F. 2d 834 (3d Cir. 1987), cert. denied, 484 U.S. 979 (1987); Clark v. Coats & Clark, Inc., 865 F. 2d 1237 (11th Cir. 1989). This view is far from uniform. In Heideman v. PFL, Inc., 904 F. 2d 1262, 1267 (8th Cir. 1991) the Eighth Circuit rejected the approaches adopted in Felton, Gavalik, and Clark. In Heideman, the Eighth Circuit held that wrongful discharge actions brought under Section 510 of ERISA are properly governed by a state contract statute of limitations. Under Heideman, Petitioner's action would be well within Ohio's statute of limitations for a contract action as Petitioner's claims accrued at the earliest in April, 1985.

What makes the 15 year statute of limitations especially appropriate to Petitioner's claims is that Taylor's complaint involves contractual rights

under Respondent's collective bargaining agreement and employee benefit plans. In Apponi v. Sunshine Biscuits, Inc., 809 F. 2d 1210 (6th Cir. 1987) the Sixth Circuit Court of Appeals held that either under the six year statute of limitations (O.R.C. Section 2305.07) or 15 year statute of limitations (O.R.C. Section 2305.06) would apply to a claim for recovery of early retirement benefits. Application of the 15 year statue of limitations is especially appropriate to Petitioner's claims since his action involves the breach of written employee benefit plans and a collective bargaining agreement.

The Eighth Circuit has analyzed ERISA relative to the conceptual framework of contract principles in Conley v. Pitney Bowes, 34 F. 3d 714 (8th Cir. 1994). That court discussed how employee benefit plans

which constitute bilateral contracts, or agreements where promises of future performance are exchanged, are subject to the common law of contracts.

Clearly, a claim based on ERISA is one of the spirit of contract and not of tortious wrongful discharge.

B. Proceedings Below Further Discussed

At the time of the recall of the Petitioner from lay off status, he was in the Ohio Penitentiary System and was unable to report to work as requested. After his release in April of 1985, he filed a grievance protesting his discharge. The grievance was submitted to arbitration on February 5, 1986 and the arbitrator denied the grievance and upheld the discharge.

Thereafter, the union filed a second grievance on Petitioner's behalf challenging the validity of the first arbitrators' award on the grounds that the award was not issued in a timely manner as called for by the collective bargaining agreement. A second arbitration was held on November 13, 1986 and again the Plaintiff's discharge was upheld. On September 3, 1986 the Plaintiff filed his complaint in the United States District Court for the Northern District of Ohio Eastern Division seeking to vacate the first arbitrators' award that upheld the discharge and denied Petitioner's request for reinstatement. The Respondent filed a motion to dismiss on procedural grounds and on December 24, 1986 the Court granted the Defendant's motion to dismiss pursuant to 9 U.S.C. Section 12 on the grounds that the Petitioner's complaint did not comply

with the three month filing deadline set forth in the United States Code, which section requires that:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.

In its judgment entry of December 24, 1986, the Court cited the fact that the adverse arbitration award was issued on April 14, 1986 while Plaintiff did not file his complaint in the Court until September 3, 1986, some 45 days beyond the filing deadline as required by 9 U.S.C. Section 12.

The Court failed to acknowledge that Petitioner was under a mental ill status and that therefore the statute of limitations cannot run against such an individual.

It is important to further acknowledge that at no time was the arbitration matter heard on the merits by the Court.

Thereafter, Petitioner filed another complaint against Respondent on September 4, 1992 alleging a violation of ERISA Section 510, 29 U.S.C. Section 1140, asserting the aforesaid claims. On May 5, 1993, the District Court granted Respondent's motion for judgment on the pleadings as to Petitioner's ERISA Section 510 claim, deferring judgment on Petitioner's contract claims, and notifying the parties of the conversion of Respondent's motion for judgment on the pleadings to one for summary judgment as to Petitioner's contract claim. The Court granted summary judgment to Respondent as to Petitioner's contract claims under the doctrines of collateral estoppel and res

judicata. Petitioner then filed a notice of appeal to the Sixth Circuit Court of Appeals which court affirmed the district court's decision.

It is important for this Court to review the issue of collateral estoppel and res judicata as applies to the filing of an ERISA claim even when not filed before a labor arbitration proceeding. Respondent's argument that the doctrines of res judicata and collateral estoppel must preclude petitioner's claim is erroneous. Indeed, this issue was studied in the case of Manser v. Missouri Farmers Association, 652 F. Supp. 267 (W.D. MO 1986). Hence, the litigation of an ERISA claim cannot be dismissed summarily without hearing on the merits just because the matter in some form was ruled upon by an arbitrator. The lower court's

affirmance of the trial court's dismissal of petitioner's claim on these two doctrines is clearly erroneous.

REASONS FOR GRANTING THIS PETITION

It is clear that at the district court level conflicting decisions are proliferating rapidly in nearly all circuits and the need for guidance from this Court in regard to this very important federal statute is acute. This case is thus submitted on a timely and opportune basis so the court can provide guidance since there are clear reasons why few of the district court decisions receive appellate review. Furthermore, the decision below is erroneous and the issue addressed is very important.

One of the most critical components of any action is the time frame in which it can be brought before it is out of

time. Certainly, this court should restate clearly that an individual who is mentally ill tolls any statute of limitation, but more significantly, a litigant should be able to rely on a time certain and not have to reflect on appellate hindsight what the statute of limitation for filing should have been.

The only way for ERISA to have a defined limitation period would be for this court to guide whether an action through ERISA sounds in contract or wrongful termination. To simply say that the limitation should be governed by that of the state limitation period cannot suffice because this proposition requires an interpretation and value judgment which could alter the statute from four years to six year to 15 years. The lower court in finding that the statute was akin to a wrongful discharge statute of limitation

is simply erroneous because an interference with a contract benefit is a breach of a writing.

Regardless of the length of a statute of limitation, a mentally ill laborer should not be denied the tolling of a statute or a time period where the law clearly tolls the statute for such a disabled individual. The decision of the court below contrary to this finding is simply erroneous but more importantly, unjust.

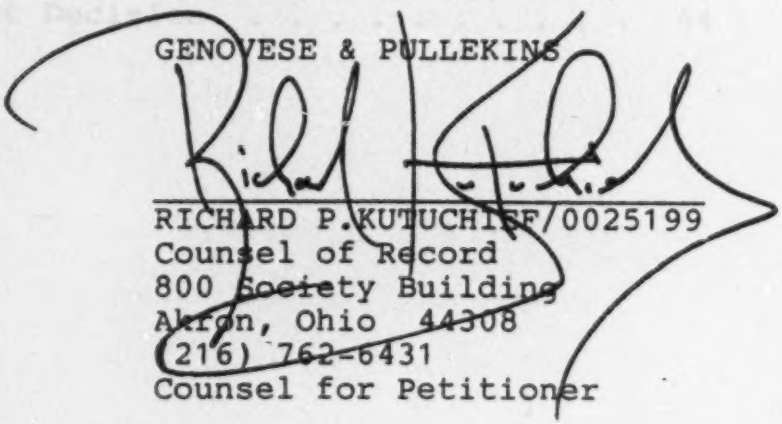
Finally, review of the decision below is important because of the cloud it places over the statute of limitations applicable to other labor provisions in the United States Code. This court should resolve the uncertainty and remove this cloud.

CONCLUSION

This petition for a writ of certiorari should be granted and the issue of the statute of limitations and proceedings in regard to ERISA relevant to grievances and arbitration awards should be defined and clarified.

Respectfully submitted,

GENOVESE & PULLEKINS



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APPENDIX

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Appendix A

Filed
October 17, 1994

No. 93-4059

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDDIE TAYLOR,)
)
Plaintiff-Appellant,)
)
v.) O R D E R
)
THE GOODYEAR TIRE &)
RUBBER COMPANY,)
)
Defendant-Appellee,)

BEFORE: MARTIN, NELSON and NORRIS,
Circuit Judges

Eddie Taylor, a pro se Ohio resident, appeals a district court judgment which construed Taylor's complaint as having been brought under Section 510 of the Employment Retirement Income Security Act (ERISA), 20 U.S.C. Section 1140, and under Section 301 the Labor Management Relations Act (LMRA), 29 U.S.C. Section 185. The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this

panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Taylor was employed by Goodyear from June 27, 1968, until January 23, 1980. Taylor alleged that while he was on layoff status at Goodyear, he was incarcerated in an Ohio prison and was mentally ill. During his incarceration, Goodyear sent Taylor a recall letter on September 30, 1983, despite the fact that Taylor had informed Goodyear that he was incarcerated and being treated for mental illness. After Taylor was released from prison, Taylor requested that Goodyear recall him and retroactively classify him as on sick leave during his period of incarceration, and Goodyear refused to comply. Taylor alleged that it was Goodyear's intent to interfere with Taylor's attainment of benefits in the employee benefit plan and

in his future participation in this plan in violation of ERISA, 29 U.S.C. Section 1140, and in violation of "a collective bargaining agreement."

On May 5, 1993, the district court granted Goodyear's motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) as to Taylor's claim under Section 510 of ERISA. The district court treated Goodyear's motion for judgment on the pleadings as one for summary judgment with regard to Taylor's breach of a collective bargaining agreement claim and found in favor of Goodyear on this claim. On appeal, Taylor's brief is construed as arguing those claims which he raised in the district court.

Upon de novo review, we conclude that the district court properly dismissed Taylor's claim under Section 510 of ERISA pursuant to Fed. R. Civ. P. 12(c), because

after accepting all the factual allegations of the complaint as true, there is no genuine issue of material fact and the defendant is entitled to judgment as a matter of law. See Paskvan v. City of Cleveland Civil Serv. Comm'n, 946 F.2d 1233, 1235 (6th Cir. 1991). Because 29 U.S.C. Section 1140 does not provide a statute of limitations for claims brought under Section 510 of ERISA, we adopt the most analogous state statute of limitations. Tolle v. Carroll Touch, Inc., 977 F2d 1129, 1137 (7th Cir. 1992); McClure v. Zoecon, Inc., 936 F2d 777, 778 (5th Cir. 1991). The most analogous state statute of limitations for Section 510 ERISA claims is based on employment discrimination and/or wrongful termination law. See Tolle, 977 F.2d at 1137-38 (Illinois five-year statute of limitations applicable to claims for retaliatory

discharge was applied to Section 510 ERISA claim); Felton v. Unisource Corp., 94 F.2d 503, 512 (9th Cir. 1991)(most analogous state statute of limitations for Section 510 ERISA claim is wrongful termination against public policy or retaliatory discharge); McClure, 936 F.2d at 778 (proper characterization of Section 510 ERISA action for limitations purposes is as wrongful discharge or employment discrimination claim); Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197, 1205 (10th Cir. 1990)(most analogous state statute of limitations regarding Section 510 ERISA claim is one for employment discrimination); Gavalik v. Continental Can Co., 812 F.2d 834, 843-46 (ed Cir.), cert. denied, 484 U.S. 979 (1987) (relied on state statute of limitations applicable to employment discrimination in Section 510 ERISA case).

Taylor's Section 510 ERISA claim is barred by the applicable Ohio statute of limitations as set forth in Ohio Rev. Code Section 2305.09(D) because his complaint was filed more than four years after his cause of action accrued.

With regard to Taylor's claim that Goodyear breached the collective bargaining agreement, we conclude that summary judgment was properly entered in favor of Goodyear because there is no genuine issue of material fact and Goodyear is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Taylor's claim is barred by the doctrines of res judicata, Kremer v. Chemical Constr. Corp., 456 U.S. 461, 467 n.6(1982); White v. Colgan Elec. Co., 781 F.2d 1214, 1216 (6th Cir. 1986); Anchor Motor Freight v. International Bhd. of Teamsters, 700 F.2d

1067, 1070 (6th Cir.), cert. denied, 464 U.S. 819 (1983); Nathan v. Rowan, 651 F.2d 1223, 1226 (6th Cir. 1981), and collateral estoppel. Montana v. United States, 440 U.S. 147, 153-54 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979); United States v. Three Tracts of Property, 994 F.2d 287, 290 (6th Cir. 1993). Taylor has already unsuccessfully litigated the issue of whether Goodyear breached the collective bargaining agreement in terminating Taylor's employment with Goodyear, see Taylor v. Goodyear Tire & Rubber Co., No. C86-3869(A) (N.D.Ohio July 30, 1991), and this court affirmed the district court's judgment on appeal. See Taylor v. Goodyear Tire & Rubber Co., No. 91-3812, 1992 WL 56750 (6th Cir. Mar. 23, 1992)

(per curiam). Therefore, Taylor's LRMA claim is barred by the doctrines of res judicata and collateral estoppel.

Accordingly, we affirm the district court's judgment. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

"s/Leonard Green"

Clerk

Appendix B

Filed May 5, 1995

Case No: 93-4059

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

EDDIE TAYLOR

Plaintiff-Appellant

v.

THE GOODYEAR TIRE & RUBBER COMPANY

Defendant-Appellee

Upon consideration of the petition for rehearing filed by the plaintiff,

It is ORDERED that the petition for hearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

"s/Leonard Green"

Leonard Green, Clerk

Section 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 USCS Section 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 USCS Section 1132] shall be applicable in the enforcement of this section.
(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 5, Section 510, 88 Stat. 895.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

References in test:
"This title", referred to in this section, is Title I of Act Sept. 2, 1974, P. L. 93-406, 88 Stat. 832, popularly known as the Employee Retirement Income Security Act.

Filed August 19, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EDDIE TAYLOR, CASE NO. 5:92 CV 1826

Plaintiff

JUDGE SAM H. BELL

vs.

THE GOODYEAR TIRE &
RUBBER COMPANY,

O R D E R

Defendant

On May 5, 1993, this court entered an order which concluded with the following paragraph:

> In accordance with the foregoing reasoning, the defendant's motion for judgment on the pleadings, Docket #26, is GRANTED IN PART and DENIED IN PART. Judgment on plaintiff's ERISA claim is GRANTED in favor of the defendant. Judgment on plaintiff's contract claim and its preclusion by the doctrine of res judicata is DEFERRED. Plaintiff is hereby NOTIFIED of the conversion of the remaining [portion of] defendant's motion to one for summary judgment. Both plaintiff and defendant are hereby GRANTED, if desired, ten (10) days leave to supplement their submissions on this issue.

Taylor v. Goodyear Tire & Rubber Co., No. 5:92 CV 1826, slip op. at 9-10 (N.D. Ohio May 5, 1992)(Order Granting Partial Judgment on the Pleadings). To date, neither plaintiff's nor defendant's counsel have made additional submissions on the propriety of summary judgment. As such, the court shall now fashion its own opinion on the basis of their earlier filed papers.

In his complaint, plaintiff avers that:

> [t]he action of Defendant in discharging Plaintiff, refusing to recall and/or placing Plaintiff on its recall list after completing his incarceration ... are also in violation and a breach of a collective bargaining agreement Defendant is a party to.

(Complaint at paragraphs 16-17). As the court noted in its prior order, this comprises plaintiff's extant claim and the one currently under attack:

> [i]t seems clear that plaintiff now intends to pursue a claim under Section 301 of the LMRA. While the court is inclined to believe that such a claim does not apparently lie on the face of the complaint, the defendant has not addressed any pleading deficiencies. ... Thus, we must address the grounds for judgment urged by the defendant, res judicata.

Taylor v. Goodyear Tire & Rubber Co., No. 5:92 CV 1826, slip op. at 7-8 (N.D. Ohio May 5, 1993). On the basis of the parties' briefs and evidence, reasonable minds could only conclude that the plaintiff's claims are barred by the doctrine of res judicata.

As noted by our Circuit court, "[a] final judgment on the merits in an action precludes a party from bringing a subsequent lawsuit on the same claim or cause of action or raising a new defense to defeat a prior judgment." Gargallo v. Merrill Lynch, Pierce, Fenner & Smith, 918

F.2d 658, 660 (6th Cir. 1990). Under this doctrine, the prior parties or their privies may not relitigate issues that were or could have been raised in that action. Kremer v. Chemical Construction Corp., 456 U.S. 461, 467 at note 6 (1981). This case surely presents such a circumstance.

As our Circuit Court has already noted:

> When he was released from prison in 1985, Mr. Taylor invoked the grievance procedure of the governing collective bargaining agreement to protest his termination. He argued that Goodyear should have considered him to be on leave of absence for illness, since he was being treated for mental illness while incarcerated. ... The grievance went to arbitration, and an award in favor of the defendants was delivered on April 14, 1986.

Taylor v. Goodyear Tire & Rubber Co., No. 91-3812, slip op. at 2 (6th Cir. March 23, 1992)(per curiam). In September 1986,

plaintiff brought suit in the Northern District of Ohio to challenge the arbitration award. His complaint challenged the arbitrator's award, his termination under the terms of the contract and the service credit given him by Goodyear. (See Defendant's Motion, Docket #26, Exhibit C) Judge Dowd dismissed plaintiff's challenge as untimely and concluded in his final order:

> [i]n summary, Mr. Taylor has been afforded a full and fair opportunity for review of his claims at arbitration and in this Court. ... While the Court is sympathetic to Mr. Taylor's situation and to his sincere belief that he was unjustly discharged, for the reasons previously stated, the Court is unable to grant the plaintiff's requested relief.

Taylor v. Goodyear Tire & Rubber Co., No. C86-3869A, slip op. at 6-7 (N.D. Ohio July 30, 1991). On March 23, 1992, the Sixth Circuit affirmed Judge Dowd's actions.

Taylor v. Goodyear Tire & Rubber Co., No. 91-3812, slip op. (6th Cir. March 23, 1992)(per curiam).

On the basis of plaintiff's prior litigation, the court must conclude that the defendant's violation of the collective bargaining agreement has already been litigated -- leading, no doubt, to collateral estoppel on that point. Regardless of this conclusion, however, it is clear that plaintiff's prior arbitration and appeal addressed the very claims made here, barring this suit under the doctrine of res judicata. See, e.g., Fisher v. Martin Marietta Energy Systems, Inc., 815 F.2d 703 (6th Cir. 1987)(table opinion - text in Westlaw) The Court, on its own initiative, further notes that any contract claim is clearly barred by the statute of limitations.

Accordingly, the court simply has no choice other than that urged by the defendant -- judgment in favor of Goodyear. There is no genuine issue that plaintiff's claims could have been and were raised in prior litigation, and are barred for that reason and for their untimeliness. Accordingly, the remaining portion of the defendant's motion for judgment on the pleadings (Docket #26), which has been converted to one for summary judgment, is GRANTED IN ITS ENTIRETY.

IT IS SO ORDERED.

"s/Sam H. Bell"

SAM H. BELL
United States District
Judge

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[1] The court sees no merit in a contention the plaintiff's ERISA claim could not have been joined with those in his previous complaint before Judge Dowd. See Fed.R.Civ.P. 18.

Appendix E

Filed May 5, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EDDIE TAYLOR — CASE NO. 5:92 CV 1826

Plaintiff

JUDGE SAM H. BELL

vs.

THE GOODYEAR TIRE & RUBBER COMPANY

Defendant

O R D E R

Currently before the court is defendant's motion for judgment on the pleadings. (Docket #26) The parties have fully briefed this matter, rendering the instant motion ripe for adjudication.

Standard of Review

When considering a Rule 12(c) motion, the court must accept all factual allegations of the complaint as true. Beal v. Missouri Pac. R.R., 312 U.S. 45, 51, 61 S.Ct. 418, 85 L.Ed.2d 577 (1941); Paskvan v. City of Cleveland Civil Service

Commission, 946 F2d 1233, 1235 (6th Cir. 1991). The motion may be granted when the movant is entitled to judgment as a matter of law. Paskvan, 946 F2d at 1235. Thus, the analytical framework for motions requesting judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) mirrors that utilized under Rule 12(b)(6); Drouillard v. Roche Biomedical Laboratories, Inc., 861 F2d 720, 1988 U.S.App.LEXIS 14616 (6th Cir. 1988); Adkins v. Westinghouse Materials Co., 779 F.Supp. 922 (S.D.Ohio 1991), aff'd without opinion, 983 F2d 1065 (6th Cir. 1993); Vermett v. Hough, 606 F.Supp. 932 (W.D.Mich. 1984). Both Rules 12(b)(6) and 12(c) provide appropriate methods for raising a statute of limitations defense. Rauch v. Day & Night Mfg. Corp., 576 F2d 697, 702 (6th Cir. 1978); Craig v. Western & Southern Indemnity Co., 119 F.2d 591

(6th Cir. 1941); 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure Section 1368 (1990). With These standards in mind, the court shall review the defendant's motion.

Law and Analysis

In his complaint, plaintiff alleges that he was formerly an employee of the defendant, and eventually suffered mental illness and was incarcerated. During his imprisonment, plaintiff received a recall letter to which he could not respond due to his confinement. As a result, he was terminated. Plaintiff alleges that he "was released from prison in April, 1985 and requested that defendant retroactively classify him as on a sick leave of absence during his incarceration. Defendant refused to comply with that request."

(Complaint at paragraph 10) On the basis of these and other extraneous alleged facts, plaintiff avers that:

> [t]he action of Defendant in discharging Plaintiff, refusing to recall and/or placing Plaintiff of its recall list after completing his incarceration was for the purpose of interfering with Plaintiff's attainment of benefits under an employee benefit plan and in discrimination of Plaintiff's future participation in the plan because of his mental illness. Said actions are also in violation and a breach of a collective bargaining agreement Defendant is a part to.

Defendant's action are in violation of 29 U.S.C. Section 1140. (Complaint at paragraphs 16-17) In its motion, the defendant contends that plaintiff's ERISA claim is barred by the statute of limitations. This court agrees.

As noted above, plaintiff claims a violation of Section 510 of ERISA, 29 U.S.C. Section 1140. That section provides, in pertinent part, the following:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan ....

29 U.S.C. Section 1140. ERISA does not provide a statute of limitations for claims brought under Section 510. See, e.g., Tolle v. Carroll Touch, Inc., 977 F.2d 1129, 1137 (7th Cir. 1992); Felton v. Unisource Corp., 940 F.2d 503, 510 N.10 (9th Cir. 1991); McClure v. Zoecon, Inc., 936 F.2d 777, 778 (5th Cir. 1991). In such a situation, where "there is no

federal statute of limitations ... Congress intended that the courts apply the most closely analogous statute of limitations under state law." DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 158 (1983). See also, Wilson v. Garcia, 471 U.S. 261, 266 (1985) ("the settled practice [is] to adopt a local time limitation as federal law.")

The United States Court of Appeals for the Sixth Circuit has not addressed the limitations period applicable to actions brought under Section 510 of ERISA.[1] That issue has, however, been the subject of decision by one Ohio district court. In Cowden v. Montgomery County Society for Cancer Control, 591 F.Supp. 740 (S.D.Ohio 1984). In Cowden, Judge Rice stated:

> Plaintiff is alleging that both Defendants have discriminated against him in violation of 29 U.S.C. Section 1140. To the

> extent Plaintiff is alleging violations of ERISA statutory provisions, the Court finds ORC Section 1305.07 to be the controlling statute of limitations. This section provides, "an actions ... upon a liability created by statute ... shall be brought within six years after the cause thereof accrued."

Cowden, 591 F.Supp. at 755. Judge Rice's reasoning, while persuasive, is not binding upon this court and is not shared by all courts which have studied this issue.

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[1] Plaintiff's citations to Apponi v. Sunshine Biscuits, Inc., 809 F2d 1210 (6th Cir. 1987), cert. denied, 484 U.S. 820 (1987) and Dennis v. Sawbrook Steel Castings Co., 792 F.Supp. 552 (S.D.Ohio 1991) are inapposite.

Federal courts analyzing Section 510 have analogized it to actions upon contracts, wrongful discharge and, as did Judge Rice, to a statutory action with no analogous state law claim. See, e.g., Heideman v. PFL, Inc., 904 F2d 1262, 1267 (8th Cir. 1990) (following contact limitations without analysis); Gavalik v. Continental Can Co., 812 F.2d 834, 843 (3rd Cir.), cert. denied, 484 U.S. 979 (1987) (analogous to employment discrimination claim because Section 510 claim is essentially claim of discrimination upon the basis of benefit application or eligibility). This court believes the latter view is most well reasoned and must note that "the

majority of courts of appeals that have addressed this issue have concluded that ... the most analogous statute of limitations for Section 510 claims are based on employment discrimination and/or wrongful termination law." Tolle v. Carroll Touch, Inc., 977 F2d 1129, 1137-38 (7th Cir. 1992) (citing Felton v. Unisource Corp., 940 F2d 503 (9th Cir. 1991); McClure v. Zoecon, Inc., 936 F.2d 777, 778-79 (5th Cir. 1991); Held v. Manufacturers Hanover Leading Corp., 912 F2d 1197, 1205 (10th Cir. 1990); Gavalik, supra).

Under this paradigm, plaintiff's cause of action should be compared to wrongful discharge in violation of public policy. See, e.g., Felton, 940 F.2d at 512. The statute of limitations governing such claims is Ohio Revised Code Section 2305.09(D) -- four years. Painter v.

Graley, No. 61148, slip op., 1992 Ohio App.LEXIS 6287, 1992 WL 369287 (Ohio App. 8th Dist. Dec. 10, 1992); see also Bojac Corp. v. Kutevac, 64 Ohio App.3d 368 (1990). Although this court believes, like Judge Ferguson in the Felton decision, that "state civil rights statutes ... may not be sufficiently analogous to Section 510 to fulfill the congressional purposes embodied in ERISA", an application of the limitations period applicable to such claims would produce an identical effect in the case at bar. Felton, 940 F.2d at 512. See, e.g., Gavalik, 812 F.2d at 843 (Section 510 analogous to employment discrimination claim). The difficulty with the analogy, as noted by the Felton Court, is the variable limitations periods applicable to such claims under state law. Felton, 940 F2d at 512. In Ohio, for instance, an

employment discrimination claim can be subject to limitations periods ranging from one hundred eighty days to six years. See, e.g., Duvall v. Titan Equipment Corp., No. 62809, slip op. 1992 Ohio App. LEXIS 3310, *4 (Ohio App. 8th Dist. June 25, 1992), motion overruled, 65 Ohio St.3d 1454 (1992). for these reasons, this court finds persuasive the opinions of the Felton and Cowden courts. Nevertheless, all the approaches recommended by the various majority courts of appeals and Judge Rice would render plaintiff's Section 510 claim untimely. Both plaintiff and defendant agree that plaintiff's cause of action accrued in April 1985. (Defendant's Motion, Docket #26 at 9-10; Plaintiff's Memorandum in Opposition, Docket #29 at 5) At most, analogous Ohio law would grant plaintiff six years to file his complaint. As such,

plaintiff was required to bring his charge by April of 1991. Consequently, plaintiff's complaint which brings his Section 510 claim, filed on September 4, 1992 shows an insuperable bar to relief, mandating judgment on the pleadings. This conclusion, however, does not end our inquiry.

Defendant's motion is grounded on two alternative positions. First, that the plaintiff has brought only one claim, pursuant to ERISA Section 510, and that this claim is untimely. Second, defendant contends that plaintiff's case is barred by the doctrine of res judicata. In attempting to avoid the limitations conclusion reached above, plaintiff's counsel has argued that "Taylor's complaint involves contractual rights under Defendant's collective bargaining agreement...." (Plaintiff's Memorandum at

5). As defendant has also noted, plaintiff's complaint is brought specifically pursuant to Section 510 of ERISA and its sole reference to contract rights is that "said actions are also in violation and a breach of a collective bargaining agreement defendant is a party to." (Complaint at paragraph 16) Nevertheless, it appears that plaintiff is intending to pursue a breach of contract claim. If so, defendant urges this court to preclude relitigation of such a claim under the doctrines of res judicata and collateral estoppel. (See Defendant's Reply Brief, Docket #30 at 6)(Plaintiff's assertion ... that his claim is not really an action ... under ERISA Section 510 ... and instead is really an action for breach of the collective bargaining agreement conflicts with his argument that the

claims should not be barred based on res judicata and collateral estoppel.) This situation presents some difficulty.

It seems clear that plaintiff now intends to pursue a claim under Section 301 of the LMRA. While the court is inclined to believe that such a claim does not apparently lie on the face of the complaint, the defendant has not addressed any pleading deficiencies. Thus, the adequacy of plaintiff's allegations are moot at this juncture. See, e.g., Tingler v. Marshall, 716 F.2d 1109 (6th Cir. 1983), Local 627 v. Ohio Carpenters Health and Welfare Fund, 926 F.2d 550 (6th Cir. 1991)(no sua sponte 12(b)(6) dismissals). Thus, we must address the grounds for judgment urged by the defendant, res judicata. In so doing, this court is, of course, constrained by the Federal Rules of Civil Procedure.

Regardless of the apparent merits of defendant's arguments, judgment at this juncture and on the vehicle chosen by defendant is simply inappropriate. The defendant has moved for judgment on the pleadings, a procedural device mirroring that provided for in Rule 12(b)(6). Drouillard, 861 F.2d 720, 1988 U.S.App.LEXIS 14616 (6th Cir. 1988); Adkins v. Westinghouse Materials Co., 779 F.Supp. 922 (S.D.Ohio 1991). For a complaint to be dismissed because the allegations give rise to an affirmative defense, "the defense clearly must appear on the fact of the pleading." 5A C. Wright & A. Miller, Federal Practice and Procedure Section 1357 at 348-49 (2d ed. 1990)(citing McNally v. American States Ins. Co., 382 F.2d 748, 752 (6th Cir. 1967)("the complaint should not have been dismissed ... res judicata [is not] made

out with the clarity required for summary sustaining of such proffered defense.") In the case at bar, the complaint does not mention even by inference the prior litigation of the plaintiff -- although the court acknowledges that it is extensive. Indeed, the defendant has found it necessary to proffer court documents to establish the fact of prior litigation. Clearly, plaintiff's complaint does not on its face establish the propriety of judgment on the basis of res judicata. As such, judgment on the pleadings is inappropriate. This court may, of course, convert defendant's motion to one for summary judgment. As noted in Rule 12, "[i]f a motion for judgment on the pleadings , matters outside the pleadings are presented to ... the court, the motion shall be treated as one for summary judgment." Fed.R.Civ.P. 12(c).

Defendant's motion and proffered material are thus, in effect, a motion for summary judgment. The court is, nevertheless, precluded from granting judgment at this time. The Sixth Circuit has repeatedly stated that:

> Federal Rule of Civil Procedure 56(c) requires that a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." ... Where a Rule 12(b)(6) motion to dismiss is converted into a summary judgment motion by acceptance of outside evidence, care must be taken to assure that the nonmoving party is afforded advance notice as required by Rule 56 and an adequate opportunity to show why summary judgment should not be granted.

McDonald v. Seabold, 780 F.2d 1022 (6th Cir. 1985)(table opinion). While the non-movant should be given such notice, "conversion to summary judgment without usual notice ... is grounds for reversal only when the conversion results in

prejudice." Nuclear Transport & Storage, Inc. v. United States, *90 F.2d 1348, 1351 (6th Cir. 1989), cert. denied, 494 U.S. 1079 (1990). Such prejudice rarely results "if only a substantive law question is involved." Id. While this circumstance may very well be presented by the instant motion, this court believes it would be inequitable and certainly imprudent to now hold that defendant is entitled to judgment as a matter of law. Judgment on the basis of res judicata may not be had at this time.

Conclusion

In accordance with the foregoing reasoning, the defendant's motion for judgment on the pleadings, Docket #26, is GRANTED IN PART and DENIED IN PART. Judgment on plaintiff's ERISA claim is GRANTED in favor of the defendant. Judgment on Plaintiff's contract claim and

its preclusion by the doctrine of res judicata is DEFERRED. Plaintiff is hereby NOTIFIED of the conversion of the remaining defendant's motion to one for summary judgment. Both plaintiff and defendant are hereby GRANTED, if desired, ten (10) days leave to supplement their submissions of this issue.

IT IS SO ORDERED.

"s/Sam H. Bell"

SAM H. BELL
United States District
Judge